

United States District Court
Eastern District of California

Christopher James,

Petitioner,

vs.

J. Solis, Warden,

Respondent.

No. Civ. S 04-1574 FCD PAN P

Order

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Petitioner, a state prisoner without counsel, seeks a writ of habeas corpus. See 28 U.S.C. § 2254. Respondents move to dismiss upon the ground the petition contains unexhausted claims. Petitioner concedes the petition is mixed but moves to file an amended petition and to stay these proceedings while he exhausts available state remedies.

Petitioner was convicted February 3, 2001. The appellate court affirmed.

Petitioner filed a petition for review in the California

1 Supreme Court claiming the trial court violated petitioner's
2 right to a jury trial by increasing petitioner's sentence based
3 upon a finding petitioner personally used a firearm without
4 submitting the allegation to the jury and the trial court's
5 restrictions on petitioner's cross-examination of a prosecution
6 witness violated petitioner's right of confrontation. The court
7 denied the petition.

8 Petitioner sought habeas corpus relief in the California
9 Supreme Court upon the grounds: (1) the prosecutor vouched for
10 witnesses in closing argument in violation of the Due Process
11 Clause of the Fourteenth Amendment; (2) trial counsel was
12 ineffective by failing to object to the prosecutor's comments in
13 closing argument in violation of the Sixth Amendment. The court
14 denied relief.

15 A district court may not grant a petition for a writ of
16 habeas corpus unless "the applicant has exhausted the remedies
17 available in the courts of the State," or unless there is no
18 State corrective process or "circumstances exist that render such
19 process ineffective to protect the rights of the applicant." 28
20 U.S.C. § 2254(b) (1). A petitioner satisfies the exhaustion
21 requirement by presenting the "substance of his federal habeas
22 corpus claim" to the state courts. Picard v. Connor, 404 U.S.
23 270, 278 (1971) (no exhaustion where the petitioner presented
24 operative facts but not legal theory to state courts); see also
25 Duncan v. Henry, 513 U.S. 364, 365 (1995) (to exhaust a claim, a
26 state court "must surely be alerted to the fact that the

1 prisoners are asserting claims under the United States
2 Constitution"). A claim is unexhausted if any state remedy is
3 available. See O'Sullivan v. Boerckel, 526 U.S. 838 (1999)
4 (petitioner must seek discretionary review from state court of
5 last resort); Roberts v. Arave, 874 F.2d 528, 529 (9th Cir.
6 1988) (no exhaustion where state supreme court referred
7 petitioner's appeal of trial court's denial of post-conviction
8 relief to lower appellate court and petitioner failed to appeal
9 lower court's disposition of that appeal to state supreme court).
10 A mixed petition, viz., one containing exhausted and unexhausted
11 claims, must be dismissed. Rose v. Lundy, 455 U.S. 509 (1982).

12 In his federal petition, petitioner makes the following
13 claims: (1) the trial court violated petitioner's right to a jury
14 trial by increasing his sentence based upon a finding petitioner
15 personally used a firearm even though the allegation was not
16 submitted to the jury; (2) the trial court's restriction of
17 petitioner's cross-examination of a prosecution witness violated
18 petitioner's right of confrontation; (3) during deliberations,
19 the trial court permitted the prosecution to enter into evidence
20 the taped statement and transcript thereof of a prosecution
21 witness so the jury could consider it in deliberations; (4) the
22 prosecutor's comments during closing argument violated the Due
23 Process Clause of the Fourteenth Amendment; and, (5) trial
24 counsel was ineffective for failing to object to the prosecutor's
25 improper comments in violation of the Sixth Amendment.

26 The parties agree petitioner failed to present his third

1 claim to the California Supreme Court. The petition contains
2 both exhausted and unexhausted claims.

3 Before the court can determine whether to grant petitioner's
4 request to stay this action while petitioner exhausts his third
5 claim, the court must determine whether petitioner had good cause
6 for his failure to exhaust, whether the unexhausted claim is
7 potentially meritorious and whether petitioner engaged in
8 intentionally dilatory litigation tactics. Rhines v. Weber, 125
9 S.Ct. 1528 (2005).

10 Accordingly, within 30 days from the date this order is
11 signed, petitioner shall file and serve an explanation of why
12 this court should stay this action while he exhausts his third
13 claim. Respondent has ten days to file and serve an opposition
14 or notice of non-opposition. Petitioner's failure to comply
15 with this order will result in the court permitting petitioner to
16 delete the unexhausted claim and to proceed on the other claims.

17 So ordered.

18 Dated: June 2, 2005.

19 /s/ Peter A. Nowinski
20 PETER A. NOWINSKI
21 Magistrate Judge
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